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No. 92-1848

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

Supreme Court, U.S.
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CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND; BOARD OF TRUSTEES, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND; EXECUTIVE DIRECTOR, CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,

Cross-Petitioners,

v.

WHITWORTH BROTHERS STORAGE COMPANY,

Cross-Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented for review is whether the written documents governing an employee benefit plan subject to the Employee Retirement Income Security Act of 1974 (ERISA), as amended, 29 U.S.C. § 1001 *et seq.*, must withstand judicial review under a "reasonableness" standard? Specifically, whether a trust agreement provision limiting the period for which an employer may recover contributions paid to the plan by mistake may be determined to be "arbitrary and capricious" and set aside in favor of an equitable rule created by the court?

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CROSS-PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 982 F.2d 1006 and is reproduced in Petitioner's (Cross-Respondent's) Appendix to Petition for a Writ of Certiorari at pp. 2a-65a.[1] The unpublished district court opinion is reproduced in Pet. App. at pp. 70a-81a.[2]

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[1] Citations to Petitioners' Appendix will hereinafter be made as "Pet. App. at p. —".

[2] This case has a long history before the district court and the Sixth Circuit. The first district court opinion (which is unpub-

JURISDICTION

The district court's jurisdiction was invoked under 28 U.S.C. § 1331. The jurisdiction of the court of appeals was invoked under 28 U.S.C. § 1291. The judgment of the court of appeals affirming in part, reversing in part, and remanding to the district court was entered on January 11, 1993, and its order denying rehearing was entered on February 16, 1993. Cross-Petitioners were served with the original petition for writ of certiorari on May 19, 1993. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutes involved in this case are part of, respectively, the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001 *et seq.* and the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 141 *et seq.*; specifically:

29 U.S.C. § 1103 (section 403 of ERISA)
29 U.S.C. § 1104 (section 404 of ERISA)
29 U.S.C. § 186 (section 302 of the LMRA)

Relevant parts of these statutes are reproduced in Appendix A, *infra*, at pp. 1a-3a.

STATEMENT OF THE CASE

1. *The Parties.*

Central States, Southeast and Southwest Areas Pension Fund ("Central States" or "Pension Fund")[3] is a multiemployer pension benefit plan as defined in Section 3(2)(A) of the Employee Retirement Income Security Act of 1974 ("ERISA") (as amended), 29 U.S.C. § 1002(2)(A). A multiemployer plan is one to which

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lished) was issued on January 15, 1985. The opinion of the United States Court of Appeals for the Sixth Circuit reversing the first district court opinion is reported at 794 F.2d 221.

[3] As Central States is a multiemployer benefit plan there are no parent or subsidiary corporations.

[4] Citations to ERISA will hereinafter be made to its codification at 29 U.S.C. § 1001 *et seq.*

more than one employer is required to make contributions pursuant to collective bargaining agreements with one or more local unions. 29 U.S.C. § 1002(37)(A). All contributions and earnings thereon are used to provide pension benefits for participants and beneficiaries and to defray reasonable administrative expenses. 29 U.S.C. § 1104(a)(1)(A). Central States was established pursuant to a trust agreement that provides that Central States shall be administered by a Board of Trustees. The Board of Trustees consists of four trustees appointed by labor organizations of the International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers of America ("IBT") and four trustees appointed by em-employer associations in accordance with the Taft-Hartley Act. The trust agreement grants the Trustees the power to create a pension plan document and to amend the pension plan document and the trust agreement. Trust Agreement, Article VII, Secs. 1, 3; Article X, reproduced in Appendix B, *infra*, at pp. 4a-6a.

Whitworth Brothers Storage Company ("Whitworth Brothers") was an employer which participated in the Pension Fund and made contributions to the Pension Fund pursuant to the terms of collective bargaining agreements between itself and a local union affiliated with the IBT.

2. *Background Facts and Proceedings below.*

Many of the facts pertinent to this cross-petition are accurately stated in the opinion of the Sixth Circuit. Pet. App. at pp. 2a-65a. Facts appearing in the record below, but not in the Sixth Circuit's opinion, are parenthetically cited as "(R. ——)".

A. Whitworth Brothers' Refund Claim, and the Pension Trust Agreement Provision Related to Refunds.

This case concerns the effect of a provision in the Pension Fund's trust agreement which requires employers who make refund claims for mistaken contribution pay-

ments to do so within one year of the time from which the mistaken payment was made.

Whitworth Brothers began participating in the Central States Pension Fund in June 1964. (R. 36: Priede Affidavit, ¶ 6). It submitted contributions on behalf of William Whitworth from June 1964 through March 1980, and on behalf of Ernest Whitworth from June 1964 through June 1981. (R. 36: Priede Affidavit, ¶ 6.) It also submitted contributions on behalf of other individuals. On November 10, 1980, Whitworth Brothers made a demand to Central States for a refund of certain contributions mistakenly made on behalf of William Whitworth over a period of 15 years. At the time this demand was made, the provision of the Central States Pension Fund Trust Agreement which governed employer refunds, Article XIV, Section 1, provided:

> In no event shall the Employers, directly or indirectly, receive any refund on contributions made by them to the Trust, except in case of bona fide mistake, and as to which contributions are returned within *one year* after payment of the contributions . . .

Appendix B, *infra* at pp. 6a-7a (emphasis added). (*See also* R. 36: Priede Affidavit, Exhibit A.)

This Trust Agreement provision was based on ERISA's refund rule, 29 U.S.C. § 1103(c)(2)(A), which, prior to September 26, 1980, permitted a pension plan to return only contributions made by an employer under a mistake of fact within one year after payment of the contributions:

> In the case of a contribution, which is made by an employer by a mistake of fact, paragraph (1) shall not prohibit the return of such contribution to the employer within one year after the payment of the contribution.

Paragraph (1) provided that "the assets of a plan shall never inure to the benefit of any employer." Congress

amended this provision on September 26, 1980 to read, in pertinent part, as follows:

> (2)(A) In the case of a contribution . . .
>
> (ii) . . . made by an employer to a multiemployer plan by a mistake of fact or law . . ., paragraph (1) shall not prohibit the return of such contribution or payment to the employer within six months after the plan administrator determines that the contribution was made by such a mistake.

In December 1980, the Central States Trustees amended the refund rule found in Article XIV, Section 1 of the Trust Agreement, retroactive to September 26, 1980, to liberalize somewhat the refund provision in the wake of the ERISA amendment which made such liberalization possible. The amended trust agreement, in relevant part, provides:

> In no event shall the Employers, directly or indirectly, receive any refund on contributions made by them to the Trust, except a refund of contributions made by a mistake of fact or law (other than a mistake about plan qualification or tax-exempt status pursuant to the Internal Revenue Code) as determined by the Trustees if application therefor is received within one year after payment of the contributions.

(R. 36: Priede Affidavit, Exhibit B.)

In adopting this change the Trustees recognized:

> (a) the need to deter, and to protect the Fund from, employer payment of contributions on behalf of employees or other persons *ineligible* to become participants and beneficiaries of the Fund, by application of reasonable standards for entitlement to employer contribution refunds; and (b) the need to deter, and to protect the Fund from, unjustified and detrimental delay by employers in seeking employer contribution refunds, by application of *reasonable time limits* upon request for such refunds . . ."

(R. 36: Priede Affidavit, Exhibit B [emphasis in original].)

B. The Proceedings Below.

On November 10, 1980, Whitworth Brothers made its demand for a refund. The request for a refund of pension contributions made on William Whitworth's behalf from June 1964 through November 10, 1979 was denied, but a refund credit was approved in accordance with Article XIV, Section 1 of the Trust Agreement for the period of November 11, 1979 (one year prior to the request) through March 1, 1980 (the last day of contributions made on William Whitworth's behalf). Prior to filing a lawsuit, Whitworth Brothers did not seek a refund of any contributions made on behalf of Ernest Whitworth.

In September 1983, Whitworth Brothers sued Central States, in a three-count complaint seeking a refund of contributions made to the Central States Pension Fund on behalf of William and Ernest Whitworth. Specifically, Count I of the complaint alleged a right, pursuant to 29 U.S.C. § 1103(c)(2)(A)(ii), to recover contributions made by Whitworth Brothers to the Pension Fund on behalf of William Whitworth and Ernest Whitworth *after* the effective date of ERISA (i.e., after January 1, 1975); Count II alleged a pendent state-law claim for restitution of Whitworth Brothers' contributions for William Whitworth and Ernest Whitworth *prior* to the effective date of ERISA (i.e., prior to January 1, 1975); and Count III sought a declaratory judgment pursuant to 28 U.S.C. § 2201 that Ernest Whitworth is not covered by the collective bargaining agreement providing for contributions to the Pension Fund, that Whitworth Brothers is entitled to restitution plus interest of the payments made on Ernest Whitworth's behalf, and that Central States is not entitled to recover unpaid contributions. Jurisdiction was claimed pursuant to ERISA and 28 U.S.C. § 1331.

In January 1985, the district court entered an order dismissing the ERISA counts of the Complaint for lack of jurisdiction over the subject matter because ERISA did not specifically authorize employers to file ERISA

actions, and dismissing the pendent state law claim pursuant to its discretionary authority.

Whitworth Brothers appealed, and the United States Court of Appeals for the Sixth Circuit reversed and remanded. *Whitworth Brothers Storage Co. v. Central States, Southeast and Southwest Areas Pension Fund*, 794 F.2d 221 (6th Cir.), *cert. denied*, 479 U.S. 1007, 107 S.Ct. 645, 93 L.Ed2d 701 (1986) ("*Whitworth I*"). In its opinion, the Sixth Circuit considered "whether the district court had jurisdiction of such a claim [by an employer for restitution of contributions made, allegedly by mistake, to an employee benefit plan] based on: (1) the express actions recognized in ERISA; (2) an action implied from the terms of the statute; or (3) an action arising under federal common law." 794 F.2d at 224. The Sixth Circuit answered the first two of these questions in the negative, holding that "section 502 [29 U.S.C. § 1132] is an exclusive grant of jurisdiction, that ERISA does not expressly provide for an action by an employer against a fund for a refund of contributions," and that an employer has no "implied right of action pursuant to section 403 [29 U.S.C. § 1103]." *Id.* at 228, 233. However, the Sixth Circuit characterized Whitworth Brothers' restitution claim as a "contract claim", found that such a claim is governed by federal common law and held that Whitworth Brothers' action for restitution "arises under" federal law for the jurisdictional purposes of 28 U.S.C. § 1331. *Id.* at 236. The Sixth Circuit held the district court erred in concluding that it had no jurisdiction over the case. *Id.* at 236. In so holding, however, the Sixth Circuit made it clear that Whitworth Brothers' federal common law claim was expressly limited by the terms of ERISA set out in 29 U.S.C. § 1103(c)(2)(A), and by the terms of the agreement between the parties. *Id.* at 236, n.24. (The Sixth Circuit, as do a number of the other courts of appeals, refers to the written documents governing the plan [the plan document and, where applicable, the collective bargaining agreement and trust

agreement or declaration of trust] as "agreements," "contracts," or "contractual documents." *See Whitworth I*, 794 F.2d at 236 n. 24 ("agreement"); *Crews v. Central States*, 788 F.2d 332, 336 (6th Cir. 1986) ("the contract in this case, the Trust Agreement. . .")).

Central States petitioned this court for a writ of certiorari to resolve the direct conflict between the Sixth Circuit in *Whitworth I* and the Eleventh Circuit in *Dime Coal Company, Inc. v. Combs*, 796 F.2d 394 (11th Cir. 1986), which held that a federal common law cause of action of restitution was not available to employers which made mistaken contributions to employer benefit plans. This Court denied certiorari.

On remand, Central States moved for Summary Judgment. The district court granted Central States' motion as to counts one and two of the complaint, holding that: (1) since the Board of Trustees of Central States acted in accordance with the written trust agreement, the Trustees' decision as to Whitworth Brothers' claim for a refund was not arbitrary or capricious (Count I); and (2) Whitworth Brothers' claim for restitution of contributions paid to Central States prior to January 1, 1975 (when ERISA became effective) was barred by the contract of the parties (the trust agreement) which limited claims for refunds, as described above. (Count II). Because of the district court's ruling on counts one and two, there remained no issue of fact on count three; therefore, judgment on count three was for Whitworth Brothers. Whitworth Brothers appealed again.

The Sixth Circuit issued an opinion on January 11, 1993, in which it affirmed in part and reversed in part the judgment of the district court, and remanded for further proceedings; specifically: (1) the district court's denial of a refund for all pre-ERISA contributions made prior to January 1, 1975, was affirmed on the basis of the trust agreement provision in effect during that period; (2) the dismissal of the complaint in regard to post-

ERISA contributions made on behalf of Ernest Whitworth after January 1, 1975, was affirmed because he had not requested a refund from the Pension Plan before filing suit; (3) the grant of summary judgment in regard to the denial of a refund of post-ERISA contributions made on behalf of William Whitworth after January 1, 1975, was reversed and remanded for a hearing on the validity of the trust agreement provision in effect after the 1980 amendment; and (4) the district court's decision that no interest is due on whatever amounts are refunded (pursuant to subparagraph 3 above) was affirmed. Pet. App. at pp. 63a-65a. Whitworth Brothers' petition for Rehearing was denied on February 16, 1993. Pet. App. at pp. 68a-69a.

SUMMARY OF REASONS FOR GRANTING THE WRIT

In this case the United States Court of Appeals for the Sixth Circuit has held that the terms of a pension plan trust agreement regulating refunds to employers must withstand scrutiny for reasonableness under "equitable principles." The Fifth Circuit appears to have taken a similar approach in *Jamail, Inc. v. Carpenters Dist. Council of Houston Pension and Health and Welfare Fund*, 954 F.2d 299, 305 (5th Cir. 1992), *reh'g denied*. In contrast, the Ninth Circuit and the Third Circuit maintain that the courts cannot set aside provisions in a benefit plan or trust agreement affecting refund claims when those terms are fixed by a trust agreement and a collective bargaining agreement (*Admiral Packing Co. v. Robert F. Kennedy Farm Workers Medical Plan*, 874 F.2d 683, 684 (9th Cir. 1989)), or by other documents governing the plan (*Van Orman v. American Ins. Co.*, 680 F.2d 301, 312 (3rd Cir. 1982) (requesting a refund of contributions which, although not mistakenly made, resulted in a surplus)). *But see Plucinski v. IAM National Pension Fund*, 875 F.2d 1052 (3d Cir. 1989) (*contra*).

These contradictory approaches result from an even deeper conflict and confusion among the courts of appeals

as to the role of the judiciary in reviewing the substantive terms of the documents governing employee benefit plans. Indeed, within a given circuit it is possible to find statements from different panels which support both sides of this issue. *Compare Moore v. Reynolds Metals Co. Retirement Program for Salaried Employees*, 740 F.2d 454, 456 (6th Cir. 1984), *cert. denied*, 469 U.S. 1109, 105 S.Ct. 786, 83 L.Ed.2d 780 (1985) ("[a]bsent a violation of federal or state law, a federal court may not modify a substantive provision of a pension plan"), *with* the Sixth Circuit's ruling in this case. *See* Pet. App. at pp. 50a-51a. ("[W]e believe . . . the district court erred in upholding the one-year limitation rule found in the trust agreement without considering the equities involved.")

The line of decisions holding that the courts should effectively re-write the terms of the documents governing employee benefit plans is contrary to ERISA. Under ERISA, neither Congress nor the courts are involved in either the decision to establish a plan or the substantive terms of the plan. For example, in this case the court of appeals simply had no authority to require the Pension Fund to prove that the challenged refund provision was "fair" to the contributing employer, "necessary" for the operation of the plan, and generally "reasonable." The employer had *agreed* in a collective bargaining agreement to contribute to the Pension Fund, and therefore the employer was bound by the terms of the Pension Fund's written trust agreement (*Plumbers & Steamfitters Local 150 v. Vertex Construction*, 932 F.2d 1443, 1451 (11th Cir. 1991))—however "unfair" a court may later decide those terms to be.

Further, rulings like that of the court of appeals in this case undermine the stability and certainty in the employee benefit area which Congress acted to foster under ERISA. Congress sought to promote the written documents governing the plan as the final and certain arbiter in matters relating to employee benefits and plan governance; where these written documents are unambiguous

and do not conflict with the express terms of ERISA, they are controlling. In this case, however, the court of appeals has claimed authority to overrule the unambiguous terms of the documents governing an employee benefit plan. This marks a trend towards a type of judicial activism which threatens the stability of employee benefit plans, and, ultimately, the certainty of the promised benefits. Under the ruling announced by the court of appeals in this case, contributing employers, employees, retirees and anyone else affected by a benefit plan will have standing to challenge any written terms of any governing plan document which they perceive to be "unreasonable". This would burden the benefit plans with staggering litigation costs, and actually impede their ability to pay benefits in accordance with express plan terms.

This Court should act to correct the conflict among the circuits on this important question. The Court should prevent the erosion of ERISA's insistence that plans be operated pursuant to written documents under the guise of principles of "fairness," "equity," and "reasonableness," as discerned by judges who have not sufficiently grounded their views in the actual language and purposes of the statute.

REASONS FOR GRANTING THE WRIT

I. THE COURTS OF APPEAL ARE SPLIT ON WHETHER FEDERAL COURTS MAY INVALIDATE PROVISIONS IN DOCUMENTS GOVERNING ERISA BENEFIT PLANS ON THE GROUND THAT THEY FAIL TO MEET A "REASONABLENESS" STANDARD.

The split among the Circuits which Cross-Petitioners ask the Court to address was articulated by the Sixth Circuit in this case as follows:

> "The Circuit Courts are split in regard to the issue of whether a federal court may determine in an action for restitution under federal common law that

> a contractual limitation on refunds for contributions mistakenly made is unreasonable."

Pet. App. at pp. 34a-35a.

Underlying this split is a division among the circuits on the question of whether a federal common law cause of action for restitution exists at all. Paralleling this split is a broader disagreement among the Circuits about whether federal courts are empowered generally to engage in substantive review of the provisions in documents governing employee benefit plans, a disagreement which reflects conflicting interpretations of this Court's decision in *United Mine Workers v. Robinson,* 455 U.S. 562, 102 S.Ct. 1226, 71 L.Ed.2d 419 (1982), which held:

> "There is no general requirement that the complex schedule of the various employee benefits must withstand judicial review under an undefined standard of reasonableness."

Robinson, 455 U.S. at 574, 102 S. Ct. at 1233 (construing § 302(c)(5) of the Labor-Management Relations Act, 29 U.S.C. § 186(c)(5)).

The authoritative voice of this Court is needed to make it clear that the provisions in the written documents governing ERISA benefit plans are not subject to judicial review under an undefined standard of "reasonableness."

The confusion among the courts of appeals is reflected in the vast difference in the law from one Circuit to another. The Eleventh Circuit has held that no federal common law cause of action exists for recovery of mistaken contributions at all. *Dime Coal Co. Inc. v. Combs,* 796 F.2d 394, 399 n.7 (11th Cir. 1986).

The other Circuits which have addressed the question have held that a cause of action exists, but are in disarray as to whether a "contractual" document (collective bargaining agreement, trust agreement, or plan document) will control the result and, if not, what weight should be

given to such written refund provisions. The Ninth Circuit has held that a trust declaration provision governing refunds controls the outcome and is not subject to judicial review for reasonableness, at least where the trust provision is based upon a collective bargaining agreement provision. *Admiral Packing Co. v. Robert F. Kennedy Farm Workers Medical Plan*, 874 F.2d 683 (9th Cir. 1989). In *Whitworth I*, the Sixth Circuit held that any recovery would be limited by terms of the relevant agreement, *Whitworth v. Central States*, 794 F.2d 221, 236 n.24 (6th Cir. 1986), but in *Whitworth II* it held that the refund provision in the trust agreement would be ignored unless it were "based on actuarial data and necessary to the fund's financial stability." Pet. App. at p. 52a. It also indicated that even a clear provision in a collective bargaining agreement would not control the outcome. *Id.* at 48a. The Fifth Circuit has held that a benefit plan's refund policy "could be one of the many factors considered in analyzing the equities of the case." *Jamail, Inc. v. Carpenters District Council of Houston Pension and Welfare Fund*, 954 F.2d 299 (5th Cir. 1992), *reh'g denied*. In *Jamail* the Fifth Circuit found other factors more important, however, and created a four year rule to replace the benefit plan's six month rule. It limited its holding to the "equities" of the case, however, indicating that the plan's six-month rule might be respected in other situations. Similarly, the First Circuit has declined to offer a "catalog" of the considerations subject to equitable weighing: "Equity, after all, is meant to be flexible." *Kwatcher v. Mass. Service Emp. Pension Fund*, 879 F.2d 957, 967 (1st Cir. 1989).

This issue is crucial to benefit plans and to the entire fabric of ERISA. The circuits holding that there must be review of the "reasonableness" of refund restrictions are opening the door to substantive judicial scrutiny of all the terms of ERISA plans. This will embroil the federal courts in issues that are far removed from the

fundamental ERISA concern for upholding the sanctity of employee benefits in accordance with written plan documents and written procedures. This sort of judicial intervention is in fact directly opposed to the goals of ERISA because it results in wiping out the terms of the written governing documents which federal courts find to be "unreasonable" under "principles of equity". Pet. App. at 34a-36a. Indeed, it appears to be the view of the Sixth Circuit in this case that it is the business of the courts to seek out and destroy "inequitable" terms even in a collective bargaining agreement. Pet. App. at 48a.

This Court should clarify that the reasoning of *Robinson* applies (and court review is inappropriate) to all of the "documents and instruments governing the plan," ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), absent a specific violation of ERISA or other federal law. The structure of ERISA, as well as the intent of Congress in passing it, requires this result.

ERISA § 3(16), 29 U.S.C. § 1002(16), defines the two entities primarily involved in overseeing the plan:

> (A) The term "administrator" means:
>
> (i) the person specifically so designated . . .;
>
> (ii) if an administrator is not so designated, the plan sponsor;
>
> (B) The term "plan sponsor" means (i) the employer in the case of an employee benefit plan established or maintained by an employer, . . . or (iii) in the case of a plan established or maintained . . . jointly by one or more employers and one or more employee organizations, the . . . joint board of trustees . . . who establish or maintain the plan.

The plan sponsor is the entity which creates the benefit plan and amends it. *Id.; Cf. Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1158-1161 (3d Cir. 1990). The plan administrator, on the other hand, manages the plan

in accordance with the documents governing the plan (generally the plan document and, in the case of a plan operated through a trust fund, the trust agreement). The roles of these two entities are distinct, and ERISA treats them differently, providing for judicial review of certain plan administrator actions but not plan sponsor actions (unless the latter conflict with a specific provision of ERISA).

> "Under ERISA, the roles of plan administrator and plan sponsor are distinct. The plan administrator owes a fiduciary duty to plan participants; the plan sponsor, so long as it is not acting as an administrator, generally does not."

Hozier v. Midwest Fasteners, Inc., 908 F.2d at 1158.[5] Of course the plan sponsor may also act as plan administra-

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[5] While ERISA creates no cause of action to review the actions of the plan sponsor creating or amending the documents governing a plan, the actions of a plan administrator who denies benefits may be reviewed:

> "A civil action may be brought . . . by a participant or beneficiary . . . to recover benefits due to him *under the terms of his plan*. . . ."

29 U.S.C. § 1132(a)(1)(B) (emphasis added). The origin of the distinction in treatment is the definition of "fiduciary" in ERISA:

> Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.
>
> 29 U.S.C. § 1002(21).

While a fiduciary has duties under ERISA, and remedies are provided for breaches of those duties, there are no provisions for plan sponsor duties or remedies to address plan sponsor action, unless the action violates a specific provision of ERISA.

tor, as is the case with Central States' Board of Trustees. In such cases, the question of whether an action is subject to judicial review depends on what type of function the board is performing.

But in determining whether "administration" includes decisions to create or amend a plan's provisions (or a trust agreement's provisions), courts have been mindful, at least in regard to amendments concerning benefits eligibility, of Congress' expressed intent not to permit judicial review of plan sponsor decisions with respect to plan amendment:

> In drawing the line between employer actions subject to the fiduciary duty requirement and those not, we must avoid any rule that would undermine Congress' considered decision that welfare benefit plans not be subject to a vesting requirement. . . . We employ a rule . . . that a company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan.

Adams v. Avondale Industries, Inc., 905 F.2d 943, 947 (6th Cir.), *cert. denied*, 498 U.S. 984, 111 S.Ct. 517, 112 L.Ed.2d 529 (1990). This rule applies equally to non-vested benefits under a pension plan. *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016, 107 S.Ct. 1893, 95 L.Ed.2d 500 (1987) ("ERISA simply does not prohibit a company from eliminating previously offered [retirement] benefits that are neither vested nor accrued.").

In determining not to authorize judicial review of provisions governing the plan themselves, Congress struck a balance:

> Although Congress sought to establish minimum standards for pension plans to assure that employees would not be denied benefits arbitrarily, it recognized that if its standards were too stringent, the creation of new pension plans would be discouraged. . . . Thus, Congress struck a balance by providing for judicial review of trustees' administrative decisions

> while declining to dictate the type of benefits which must be included in voluntarily established retirement plans.

Moore v. Reynolds Metals Co. Retirement Program for Salaried Employees, 740 F.2d at 457 (*"Reynolds Metals"*).

The court in *Reynolds Metals* cited this Court's decision in *Robinson* for the proposition that "[a]bsent a violation of federal or state law, a federal court may not modify a substantive provision of a pension plan." *Id.* at 456. While *Robinson* was only concerned with § 302 of the LMRA, *Reynolds Metals* extended its reasoning to ERISA. *Id.* at 456. The Fifth Circuit in turn has relied on the same construction of ERISA and has extended it to a single employer trust fund. *Vasseur v. Halliburton Co.*, 950 F.2d 1002, 1004, 1006-1007 (5th Cir. 1992). *Cf. McGann v. H & H Music Co.*, 946 F.2d 401 (5th Cir.), *cert. denied sub nom.*, —— U.S. ——, 113 S.Ct. 482, 121 L.Ed.2d 387 (1991); and *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929 (5th Cir. 1993), *reh'g denied*. It is no less a function of the plan sponsor to determine the circumstances under which plan assets may be expended in refunding a contribution. If ERISA does not prohibit Central States' trust agreement provision, then it must be allowed. No "arbitrary and capricious" standard may be applied.

An opposite view of *Robinson* is provided in *Deak v. Masters, Mates and Pilots Pension Plan*, 821 F.2d 572 (11th Cir. 1987), *cert. denied*, 484 U.S. 1005, 108 S.Ct. 698, 98 L.Ed.2d 650 (1988). In that case the Eleventh Circuit read *Robinson* as supporting an "arbitrary and capricious" review of plan amendments under ERISA. *Id.* at 574, 577. *Deak* held that a court should examine "whether a rational relationship exists between the Trustees' actions and the Plan's purpose," *id.* at 577, almost the exact proposition *rejected* by this Court in *Robinson*,

at least in the context of the LMRA. *See Robinson*, 455 U.S. at 568, 102 S.Ct. at 1230. This is also almost identical to the position taken by the Sixth Circuit in *Whitworth II* (i.e., "[U]nless a refund limitation policy is based on actuarial data and necessary to the pension fund's financial stability, it is not necessary for the protection of the property held under the trust agreement for the benefit of the employees, and is arbitrary and capricious.") Pet. App. at p. 52a.[6] This is the broader conflict discussed above between Circuits which hold that *Robinson*'s reasoning precludes judicial review of the provisions of benefit plans, and Circuits which hold that *Robinson*'s reasoning *requires* judicial review of benefit plan provisions for reasonableness.

Thus, there exists a conflict between *Whitworth II* and the principle this Court articulated in *Robinson* that no general requirement of reasonableness is imposed on benefit plan rules; and there exists a conflict between the Sixth Circuit in *Reynolds Metals* and the Ninth Circuit in *Admiral Packing*, on the one hand, and the Eleventh Circuit on the other hand, concerning the application of *Robinson*'s reasoning under ERISA. (There also exists a conflict within the Sixth Circuit between the principles in *Reynolds Metals* and those in *Whitworth II*. *See* fn. 6, *supra*).

This Court should grant the cross-petition for certiorari in order to clarify the reach of *Robinson*'s reasoning and to eliminate these conflicts by ruling that otherwise valid provisions in documents governing benefit plans are not

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[6] In addition to the fact that there is the apparent conflict just discussed between the Sixth, Ninth, and Eleventh Circuits in their application of this Court's decision in *Robinson*, there is a conflict within the Sixth Circuit between the principles set forth in its decision in *Reynolds Metals* and the principles under which *Whitworth II* was decided. *Reynolds Metals* states that no pension plan provisions are subject to judicial review, whereas *Whitworth II* indicates that all plan provisions are subject to judicial review.

reviewable by courts under ERISA, the LMRA, or federal common law for their adequacy under an "arbitrary and capricious" standard in order to satisfy a court's notion of reasonableness or equity.

II. THE DECISION OF THE COURT BELOW THREATENS THE FINANCIAL STABILITY OF CENTRAL STATES AND OTHER EMPLOYEE BENEFIT PLANS WHICH CONGRESS HAS SOUGHT TO PROTECT. THE CONSEQUENCES OF THE ERROR ARE FAR-REACHING, AND RAISE QUESTIONS OF NATIONAL IMPORTANCE.

The consequences of the court's error [7] are far-reaching; the implications are great because its impact goes beyond the parties to this lawsuit, and it invites the courts to second-guess provisions in the documents governing benefit plans.

At first blush this appears to be a small case. If the issue of whether Central States' one-year refund limitation provision in regard to post-ERISA contributions is not arbitrary or capricious is tried before the district court (it should not be), and *if* Whitworth Brothers prevails, its recovery will be limited to just $4,238.00 (i.e., the amount of post-ERISA contributions made to Central States on behalf of William Whitworth). But the amounts potentially at issue here are hardly trivial, and more importantly, the most damaging aspect of the court's decision

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[7] The district court, unlike the court of appeals, correctly applied the *appropriate standard of review*: it held that the trustees' decision denying Whitworth Brothers' refund request was not arbitrary and capricious based on the evidence before the trustees at the time of their final decision, and the controlling trust agreement provision. Thus, the only issue before the court of appeals was whether the district court's decision was erroneous, i.e., whether the district court applied the wrong standard of review. The court of appeals' failure to address the issue, and its decision that the issue to be decided by the district court was whether Central States' one-year refund limitation in its trust agreement regarding post-ERISA contributions made after January 1, 1975 is not arbitrary or capricious is clearly wrong.

goes beyond its direct monetary impact. On remand, Whitworth Brothers filed a motion for leave to amend to add a class action to the lawsuit. The class, if certified, will be seeking (as Whitworth Brothers has indicated) to recover approximately $700,000.00 from the Pension Fund in contributions which had been received by the Pension Fund over a period of years prior to December 1983. These are amounts the Pension Fund has relied upon in making its actuarial projections and in paying retiree pension benefits for more than a decade.

In enacting ERISA, Congress determined that since "the continued well-being and security of millions of employees, retirees, and their dependents are directly affected with a national interest," 29 U.S.C. § 1001(a), the financial stability of employee benefit funds (such as Central States) is a public concern. If not corrected, the court's error will have an adverse effect on the financial stability of Central States (the nation's largest multiemployer benefit fund) and other employee benefit funds. The financial stability of such funds, which Congress has sought to protect, should not be threatened by the decision of the court below. The most significant threat to the Pension Fund's stability posed by the court's decision is not even the danger of increasing the amount of its currently unfunded vested benefits, but rather the prospect that every provision of its plan and trust agreement may be challenged as being "arbitrary."

The court of appeals is wrong to have second-guessed the trustees. The mischief created by the Sixth Circuit's ruling is particularly troublesome because—although the ruling is cloaked in the deferential language of the "arbitrary and capricious" standard—in reality the court has held that employee benefit plan trust agreement amendments limiting refunds must be justified by financial "necessity" and "compelling reasons". *Id.* This is, at best, cosmetic "deference" which in fact straight-jackets the Pension Fund Trustees and requires them to prove that

every penny in refund claims that are denied by a trust agreement provision is "necessary".

In addition, as noted, it appears that in the view of the Sixth Circuit, the courts should apply "equitable principles" to overturn the express written terms of employee benefit plans even though the employer has *agreed* to the terms in a collective bargaining agreement. Pet. App. at p. 48a. This portends a "federal common law" which is not guided by concrete policies articulated in federal statutes, but is instead a recrudescence of the "brooding omnipresence in the sky" first criticized by Justice Holmes in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222, 37 S.Ct. 524, 531, 61 L.Ed. 1086 (1917) (Holmes, J., dissenting). An employer contributing to a multiemployer pension plan such as Central States is bound by the terms of the pension plan and trust agreement and is not free to seek release from these terms on "equitable" principles. *Cf., e.g., Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 563-64, 105 S.Ct. 2833, 2836-37, 86 L.Ed.2d 447 (1985). The court below ignored the employer's duty to adhere to the Trust Agreement, and imposed a judicially concocted and ill-defined duty of "fairness" upon the Pension Fund.

As noted above, in December 1980 the Trustees stated their reasons for adopting the refund provision with its time limitations. In light of the Pension Fund's obligation in December 1980 to pay vested pension benefits which exceeded the projected value of the Fund's assets (an obligation extant today)[8] were the trustees, as plan fiduciaries, required to expend fund assets on an actuarial study which would only provide them an answer which was immediately and painfully obvious? The Sixth Circuit seems to think so. In theory, the court of appeals would

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[8] *See e.g., Central States, Southeast and Southwest Areas Pension Fund v. Burton Slotky*, 956 F.2d 1369 (7th Cir. 1992).

require a plan to undertake a new actuarial study with each employer refund request. The costs of doing so are clearly prohibitive. When Congress enacted ERISA to protect employee benefit rights it certainly did not envision that plans should be self-destructing; nor did it envision courts writing rules which would undermine a plan's financial stability.

This concern is evident through Congress' mandate that "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. § 1103(c)(1).

The Sixth Circuit's error threatens the financial stability of Central States and other benefit funds because it inappropriately second-guesses the decision making of plan sponsors and threatens to override refund provisions which, like that of Central States, contain time limitations on the availability of refunds. If courts are permitted to review refund limitations under a general rule that the documents governing employee benefit plans may be reviewed for reasonableness, then the floodgates are open for employers, participants, beneficiaries, and their dependents to challenge any plan provision which they deem to be contrary to their individual personal or pecuniary interests.

This will result in the courts dictating the substantive terms of employee benefit plans. Congress itself was reluctant to enter this arena. Thus, for the most part ERISA avoids dictating the substantive content of employee benefit plans, and only provides procedural rules for plan governance. The purpose of ERISA is "to make sure that if an employee has been promised a defined pension benefit . . . , he will actually receive it"—not to establish by governmental fiat what the promised pension benefit must be, or to mandate any other terms of the

employee benefit plan. *Nachman Corp. v. PBGC,* 446 U.S. 359, 375, 100 S.Ct. 1723, 1733, 64 L.Ed.2d 354 (1980).[9]

For example, the Central States Pension Fund presently provides a maximum monthly retirement pension benefit of $2,500 per month to a vested qualified retiree. If a disgruntled retiree sued Central States alleging entitlement to a greater benefit because the Pension Fund's return on its investments increased from the previous year, should a court be permitted to intervene and hold a trial to determine whether actuarial studies were done in light of the previous year's returns and whether the retirement pension benefit levels should therefore be adjusted upwards? Similarly, in the case of a welfare plan which runs a surplus for one or more years, may a court determine that plan provisions limiting the amount payable for certain medical procedures are unreasonable and require the plan to make payments forbidden by the written plan documents? These are determinations which, as Congress has recognized, neither it nor the courts are well-suited to make. Rather, under ERISA this is the type of question which Congress deliberately left to be resolved by the constituencies—the employees, retirees, and employers—which make up multiemployer benefit plans and are represented on the Boards of Trustees of those plans.

Without doubt, any employer, participant or beneficiary may be able to point to a specific plan provision which is adverse to their interest: creating plan provisions involves drawing lines, and it is always possible to argue that the lines could have or should have been drawn elsewhere. But the assets of a trust fund are held for the

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[9] The exception which proves the rule is the ERISA participation and pension vesting requirements. *See generally* 29 U.S.C. §§ 1052 and 1053. In other matters affecting the substantive terms of benefit plans Congress intended to give market forces free sway. *See Adams v. Avondale Industries,* 905 F.2d at 947 (noting that Congress intended the terms of employee benefit plans to be set by private parties except where ERISA expressly establishes a standard, as in the vesting of pension benefits).

benefit of *all* participants and their beneficiaries. *See* H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin New 5038, 5083. When trustees of a benefit fund adopt amendments to the trust agreement or benefit plan, the courts should not substitute their own reasoning for that of the trustees. But that is what the Sixth Circuit is attempting to do here.

This ruling—as the Sixth Circuit recognized—is at variance with the approach of other courts of appeals. It is also, as Central States has argued, at variance with ERISA and with the decisions of this Court.

The financial stability of Central States (and other benefit plans) should not be jeopardized because the court of appeals second-guessed, years after the fact, the reasoning of the Central States' plan sponsor. This Court should grant this cross-petition for certiorari. That part of the Sixth Circuit's decision reversing and remanding to the district court should be reversed.

CONCLUSION

For the foregoing reasons, this Court should grant the cross-petition for a writ of certiorari.

Respectfully submitted,

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